INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Convention and decree involved	2
Statement	2
Argument	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

Adam v. *Saenger*, 303 U. S. 59	6
Bernstein v. *N. V. Nederlandsche-Amerikaansche etc.*, 11 F.R.D. 48	6
Board of Public Utility Commissioners v. *Ynchausti & Co.*, 251 U. S. 401	4
Brothers v. *United States*, 250 U. S. 88	7
Chesapeake & Potomac Tel. Co. v. *United States*, 281 U. S. 385	7
Chicago & Alton R'd. v. *Wiggins Ferry Co.*, 119 U. S. 615	6
Compania Trans. de Petroleo v. *Mexican Gulf Oil Co.*, 292 Fed. 846	6
Dainese v. *Hale*, 91 U. S. 13	6
Desmare v. *United States*, 93 U. S. 605	6
Fairmount Glass Works v. *Coal Co.*, 287 U. S. 474	11
General Pictures Co. v. *Electric Co.*, 304 U. S. 175	7
Hanley v. *Donoghue*, 116 U. S. 1	6
Helena Water Works v. *Helena*, 195 U. S. 383	9-10
Hudson River Pulp & Paper Co. v. *H. H. Warner & Co.*, 99 Fed. 187	6
Labor Board v. *Pittsburgh S. S. Co.*, 340 U. S. 498	7
Liverpool etc. Steam Co v. *Phenix Ins. Co.*, 129 U. S. 397	6
O'Keefe v. *United States*, 5 C. Cls. 674, affirmed, 11 Wall. 178	6
Rothschild v. *United States*, 6 C. Cls. 204	6
Rowan v. *Commissioner of Internal Revenue*, 120 F. 2d 515	6
Standard Fruit and Steamship Co. v. *United States*, 103 C. Cls. 659	3
Starr v. *United States*, 164 U. S. 380	7
Talbot v. *Seeman*, 1 Cranch. 1	5, 6

Cases—Continued:

	Page
United Fruit Co. v. *United States*, 103 C. Cls. Cls. 303	3
United States v. *Adams*, 6 Wall. 101	6
United States v. *Esnault-Pelterie*, 303 U. S. 26	7
United States v. *Gerlach Live Stock Co.*, 339 U. S. 725	7
United States v. *Johnson*, 327 U. S. 106	11
United States v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198	7
United States v. *Pink*, 315 U. S. 203	6
United States v. *Sherebeck*, 27 Fed. Cas. 1062 (No. 16275)	8, 9
United States v. *Socony Vacuum Oil Co.*, 310 U. S. 150	11
United States v. *Uhl*, 137 F. 2d 858	6
United States v. *Wells*, 283 U. S. 102	7

Convention and Decree:

Postal Union of the Americas and Spain (50 Stat. 1657): Article 3	2, 13
Brazilian Decree No. 3.326 of June 3, 1941: Article 2, Secs. 1 and 2	3, 11, 13

Statute:

New York Civil Practice Act, Sec. 391	6

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 328

MOORE-McCORMACK LINES, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Claims dismissing the petition in part (R. 22-27) and overruling a motion for a new trial (R. 27-28) have not yet been reported.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1951 (R. 26); petitioner's motion for a new trial filed on April 19, 1951 (R. 28-30) and amended on April 26, 1951 (R. 37-41), was

overruled on July 9, 1951 (R. 27-28). The petition for a writ of certiorari was filed on September 15, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims erred in finding that under Brazilian law petitioner was required to carry certain mails free of charge and that the United States was therefore under no liability to reimburse it.

CONVENTION AND DECREE INVOLVED

The pertinent provisions of the Postal Union of the Americas and Spain (50 Stat. 1657) and of the Brazilian Decree No. 3.326 of June 3, 1941, are set forth in the Appendix, *infra,* pp. 13-14.

STATEMENT

Petitioner is an American steamship line operating between the United States and South American ports. It seeks payment by the United States for the carriage of mails placed on petitioner's ship by the Brazilian postal authorities. Petitioner bases this claim against the United States on the ground that it has been compelled to carry these Brazilian mails gratuitously under Article 3 of the Postal Union of the Americas and Spain (*infra,* p. 13, hereinafter referred to as the Convention) and that the United States, having subjected petitioner to this burden by virtue of its adherence to this Convention, by implication

undertook to reimburse it (cf. *United Fruit Co.* v. *United States,* 103 C. Cls. 303, 311; *Standard Fruit and Steamship Co.* v. *United States,* 103 C. Cls. 659, 682). The United States resisted petitioner's claim on the ground that petitioner's duty to carry Brazilian mails free of charge derived not from the Convention but from a Brazilian decree of June 3, 1941, No. 3.326 (R. 9; *infra,* pp. 13-14) obliging *all* maritime carriers to carry Brazilian mails free of charge. Petitioner contends that the word "all" in this decree does not include foreign steamship companies. The case was tried under a stipulation which provided (R. 17):

> 10. If the court finds that under Brazilian law subsequent to the Decree of June 3, 1941, and up to the date of suit, Brazil required plaintiff's vessels, to which had been granted packet[1] privileges, to carry Brazilian mails gratuitously, then payment is not due from the United States from the effective date of said Decree No. 3326. If the court finds to the contrary, then payment is due from the United States on appropriate documentary proof of carriage in form acceptable to the United States Post Office.

The Court of Claims found that the duty to carry Brazilian mails free of charge rested on the decree

[1] According to paragraph 4 of the stipulation, petitioner had asked for and received Brazilian packet privileges, pursuant to which its vessels received certain benefits and were obligated to perform certain burdens (R. 16, 25).

of June 3, 1941[2], since the Portuguese word *"todas"* meaning "all" or "each and every" covered foreign carriers as well as domestic ones (R. 21, 25). Accordingly, it held that, since the duty to carry Brazilian mails gratuitously was not imposed upon petitioner by the adherence of the United States to the Convention, it was not entitled to reimbursement by the United States for Brazilian mails carried after the effective date of the decree.[3]

Petitioner filed a motion for a new trial (R. 28-30, 37-41) based primarily on the ground of newly discovered evidence (R. 37-41). The alleged newly-discovered evidence accompanying the motion consisted of an additional translation of the Brazilian decree (R. 39-40). Petitioner asserted that this translation was "authoritative"[4] and would estab-

---

[2] Petitioner's witness, Richard P. Momsen, testified that the decree of June 3, 1941, was confiscatory and, hence, violated the constitution of Brazil (Commissioner's Report, pars. 23, 25, R. 10-11, 13-14). The Court of Claims held that in view of the valuable packet privileges conferred upon petitioner, consisting of exemption from lighthouse dues, charity taxes and the grant of preferred berthing rights which considerably lowered its costs of operations in Brazil (cf. Commissioner's Report, par. 23 at R. 11), the liability to carry mails gratuitously could not be considered confiscatory (R. 25-26). This Court has upheld analogous Philippine legislation against the claim that it violated the Philippine Bill of Rights. *Board of Public Utility Commissioners* v. *Ynchausti & Co.*, 251 U. S. 401.

[3] The court awarded petitioner $43,198.56 for Brazilian mails carried prior to June 3, 1941, and $7,570.58 for Uruguayan mails. (R. 26, cf. Commissioner's Report at R. 8).

[4] Actually the so-called "authoritative" translation was prepared by a sworn translator (R. 40), who, in the United States, corresponds to a licensed translator who performs

lish the erroneous character of the translation which the Government had submitted at the trial (R. 38). The Court of Claims overruled the motion. It found that the questioned translation has been submitted to petitioner in October 1947, three and one-half years prior to the alleged discovery, and held that petitioner, had it desired to question the accuracy of the translation, should have done so long before. (R. 27-28.) It also observed that petitioner's own witness had testified at the trial that the questioned translation was correct except for an irrelevant stylistic inaccuracy.[5] Finally, after examining the text of the decree and the methods used in preparing the translation submitted by the Government and relied upon by the court, the court found that translation to be correct (R. 28).

ARGUMENT

1. Petitioner asks this Court to review a finding of the Court of Claims determining the scope of a foreign law. In the federal courts, a foreign law is a fact which must be pleaded and proved as any other fact. *Talbot* v. *Seeman*, 1 Cranch. 1, 19;

for a fee (R. 51). The two translations differ on the question whether the words "Federal, State and Municipal" qualify only "railroads" or "all fluvial, lacustrine and maritime carriers or companies of navigation and * * * railroads" (cf. R. 50).

[5] This witness, an American citizen, would seem to be well qualified to pass on the accuracy of a translation of statutory materials since he is an eminent member of the Brazilian bar (R. 25).

Dainese v. *Hale,* 91 U. S. 13, 20; *Liverpool etc. Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 445; *Compania Trans. de Petroleo* v. *Mexican Gulf Oil Co.,* 292 Fed. 846, 850 (C.A. 2); *Rowan* v. *Commissioner of Internal Revenue,* 120 F. 2d 515, 516 (C.A. 5); *United States* v. *Uhl,* 137 F. 2d 858, 861 (C.A. 2); *Bernstein* v. *N. V. Nederlandsche-Amerikaansche etc.,* 11 F.R.D. 48, 49 (S.D.N.Y.). And since the construction of a foreign law is a question of fact in the trial court, it is likewise a question of fact in this Court and not subject to review if there is evidence to support the trial court's conclusions. *Hanley* v. *Donoghue,* 116 U. S. 1, 6; *Chicago & Alton R'd.* v. *Wiggins Ferry Co.,* 119 U. S. 615, 622-623; *Adam* v. *Saenger,* 303 U. S. 59, 63; *Talbot* v. *Seeman, supra; Hudson River Pulp & Paper Co.* v. *H. H. Warner & Co.,* 99 Fed. 187, 189 (C.A. 2).[6]

The rule that a foreign law must be proved as any other fact applies with equal force to proceedings brought in the Court of Claims. *O'Keefe* v. *United States,* 5 C. Cls. 674, affirmed, 11 Wall. 178; *Rothschild* v. *United States,* 6 C. Cls. 204. And this Court has held consistently that its review of the decisions of the Court of Claims is normally limited to questions of law. *United States* v. *Adams,* 6 Wall. 101, 112; *Desmare* v. *United States,*

[6] There is no federal statutory equivalent to Sec. 391 of the New York Civil Practice Act which permits the review by an appellate court of the trial court's rulings on foreign law. Cf. *United States* v. *Pink,* 315 U. S. 203, 220-221.

93 U. S. 605, 610; *Chesapeake & Potomac Tel. Co.* v. *United States*, 281 U. S. 385, 388; *United States* v. *Esnault-Pelterie*, 303 U. S. 26, 28; *United States* v. *Penn Foundry & Mfg. Co.*, 337 U. S. 198, 205.[7]

In this case, the finding of fact concerning the scope of the Brazilian decree is in accord with the testimony of a well-qualified Brazilian lawyer (R. 24-25). Thus, there is ample evidence in the record to support it, and it should not be disturbed. Moreover, the construction adopted by the Court of Claims is in harmony with the language of the decree, and is plainly correct. On the foregoing considerations, there is no warrant for further review.

2. Petitioner apparently has abandoned its argument that the term "all companies" appearing in the Brazilian decree does not include foreign companies. Here, its objection to the original decision of the Court of Claims appears to be limited to two points (Br. 13-16).

(a) Petitioner contends that the court below erred in not following the opinion of the Acting

---

[7] Some of the decisions of this Court assimilate the findings of fact of the Court of Claims to a jury verdict. *Starr* v. *United States*, 164 U. S. 380, 382; *Brothers* v. *United States*, 250 U. S. 88, 93; *United States* v. *Wells*, 283 U. S. 102, 120. And recently this Court has held that it will not review even rulings of law made by the Court of Claims on issues of state law, if they lack general interest. *United States* v. *Gerlach Live Stock Co.*, 339 U. S. 725, 755. See also *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503, and *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178.

Postmaster General of Brazil on the operation of the Decree of June 3, 1941, expressed in a letter written *post litem motam* at petitioner's request to the Postmaster General of the United States (R. 19). We submit that the Court of Claims properly refused to be bound by this interpretation on the ground that the Acting Brazilian Postmaster General, without more, is not authorized to give a binding interpretation of Brazilian law since that function is vested in another officer subject to the approval of the President (R. 24).

Furthermore, the record is barren of anything to show that the interpretation contained in the Acting Postmaster General's letter had been consistently applied to the Decree in the postal or other governmental establishments of Brazil by those whose duty it was to apply and administer the said Decree, or that the interpretation was the result of the refusal, generally acquiesced in, of the administrative officers to exercise their power to apply it to steamship companies.[8] Consequently, the letter did not evidence a "practical interpretation" of Brazilian law within the rule quoted by petitioner (Br. 13) from the case of *United States* v. *Sherebeck,* Fed. Case No. 16275, 27 Fed. Cas. 1062, 1063 (N.D. Cal.), to the effect that, in the absence of judicial construction, the courts

[8] The two letters (R. 20-21) referred to in the Acting Postmaster General's letter could not have been an interpretation of the Decree of June 3, 1941, since they were written prior to that date.

will be slow to disturb the interpretation of a foreign law placed upon it by those whose duty it was to apply and administer it, or to declare that powers frequently exercised and generally acquiesced in were usurped.[9] Here, there is no showing that the interpretation of Brazilian law contained in the letter had been followed regularly in administering the Decree, or that those whose duty it was to enforce the Decree had articulately declined to exercise their power to apply it to steamship companies. We submit that the Court of Claims committed no error in declining to be bound by the Acting Postmaster General's statement concerning the application of Brazilian law in general to steamship companies.

b. If we understand petitioner's second point correctly, it claims that even if the Brazilian Decree of June 3, 1941 required petitioner to carry Brazilian mail gratuitously, it was still entitled to reimbursement by the United States under the Postal Convention. This argument constitutes a complete repudiation of paragraph 10 of the stipulation which properly narrowed down the controversy to the only material issue, *viz.* whether or not the Brazilian Decree required petitioner to carry Brazilian mails free of charge. Cf. *Helena*

[9] In quoting from the language of the court in the *Sherebeck* case, which states the rule (Br. 13), petitioner omitted to show in its quotation the additional language used by the court to encompass the rule, as follows: "or to declare that powers frequently exercised and generally acquiesced in were usurped."

Water Works v. *Helena,* 195 U. S. 383, 394. Moreover, the case was tried under the proper theory. The Convention does not, as petitioner seems to contend, obligate the United States to reimburse, in any and all circumstances, ships registered under its flag and utilized by it to carry its own mail, for carrying the mail of other parties to the Convention. In fact, it makes no reference to the reimbursement of parties who carry the mail referred to therein. Where, however, such ships have carried the mail of other parties to the Convention in circumstances where the country sending the mail would be obligated to pay the carrier for its services, the United States has assumed, under the Convention, the financial burden of reimbursing the carrier for the transportation. Hence, the stipulation entered into in this case, *supra,* p. 3. But there is no implied obligation accruing from the language of the Convention that the United States shall reimburse a carrier where, under the law of the originating country, there was in the first instance no primary obligation on the part of that country itself to pay the carrier for its services. Here, there was no primary obligation on the part of Brazil to pay petitioner for carrying Brazil's mail, since the law of Brazil, *i.e.,* the Decree, forbade such payment.[10] *A fortiori,* there was no secondary obligation impliedly im-

[10] The Decree was not confiscatory since the obligation which it imposed on the carriers of Brazilian mail was in return for the grant of certain packet privileges consisting

posed by the Convention on the United States to reimburse petitioner for carrying the Brazilian mail. Petitioner's contention is, therefore, without merit.

3. Petitioner, finally, seeks a review of the overruling of its motion for a new trial in which it contended that the additional translation of the Decree was newly discovered evidence showing that the translation employed by the court was wrong. Decisions denying motions for new trials are matters falling within the discretion of the trial court and are not subject to appellate review in the absence of an abuse of discretion. *Fairmount Glass Works* v. *Coal Co.*, 287 U. S. 474, 481-482, and the authorities cited therein; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 247; *United States* v. *Johnson*, 327 U. S. 106, 111. Petitioner does not allege an abuse of discretion on the part of the Court of Claims in denying the motion.[11] The court below carefully examined the question of the accuracy of the translation and found that

---

of exemption from lighthouse dues, charity taxes imposed on each sailor and officer, and the grant of preferred berthing rights (R. 11, 25).

[11] In overruling the motion for a new trial, the Court of Claims noted the subsidiary ground that in any event Section 1 of Article 2 of the Decree (*infra*, pp. 13-14) required petitioner to carry the mails gratuitously (R. 28). Petitioner asserts that this interpretation is erroneous since Section 1 constitutes only a proviso limiting the first paragraph of Article 2 and cannot create an independent liability (Brief, p. 16). There is no support whatsoever to this limited interpretation of the statute. In the absence of some proof of Brazilian statutory technique or construction, the decree must be read to mean what it says.

the one submitted by the Government was the correct one in view of the manner in which it had been prepared (R. 28; 43-54), and especially since petitioner's own witness had testified to its accuracy (R. 27). This renewed finding of fact, which is supported by ample evidence, should not be disturbed. *United States* v. *Johnson, supra,* at 111.

CONCLUSION

The decision below is correct and contains nothing that warrants review by this Court. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
HOLMES BALDRIDGE,
Assistant Attorney General.
JOHN R. BENNEY,
SAMUEL D. SLADE,
HERMAN MARCUSE,
Attorneys.

OCTOBER 1951.

APPENDIX

1. The Postal Union of the Americas and Spain, ratified by the Postmaster General in August 12, 1937, and approved by the President in August 20, 1937 (50 Stat. 1657), provides in pertinent part:

ARTICLE 3

Free and Gratuitous Transit

1. The gratuity of territorial, fluvial and maritime transit is absolute in the territory of the Postal Union of the Americas and Spain; consequently, the countries which form it obligate themselves to transport across their territories, and to convey by the ships of their registry or flag which they utilize for the transportation of their own correspondence, without any charge whatsoever to the contracting countries, all that which the latter send to any destination.

2. In cases of reforwarding, the contracting countries are bound to reforward the correspondence by the ways and means which they utilize for their own dispatches.

2. The Brazilian Decree of June 3, 1941, No. 3.326 provides in pertinent part:

Article 2. It shall be obligatory for *all* fluvial, lacustrine and maritime carriers or companies of navigation and for Federal, State or Municipal railroads, to transport postal despatches and articles of correspondence gratuitously, without limitation on weight or volume.

Section 1. The transportation shall also be obligatory and gratuitous on railroads, navi-

gation or public highway companies or carriers enjoying especial treatment, benefits or favors from the Union, the States and Municipalities.

Section 2. In case of vessels the net tonnage of which is equal to, or less than ten tons, the weight of despatches to be transported shall not exceed 4% of such capacity. [Italics supplied.]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 972196 332